

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9

10 EARL D. PRUITT,) Case No. CV 11-7756-GW (JPR)
11)
12) Petitioner,)
13) ORDER ACCEPTING FINDINGS AND
14) vs.) RECOMMENDATIONS OF U.S.
15) MAGISTRATE JUDGE
16)
17) TIMOTHY BUSBY, Warden,)
18)
19) Respondent.)
20)
21)
22)
23)
24)
25)
26)
27)
28)

15 Pursuant to 28 U.S.C. § 636, the Court has reviewed the
16 Petition, records on file, and Report and Recommendation of the
17 U.S. Magistrate Judge. On June 5, 2012, Respondent filed
18 Objections to the Report and Recommendation. Petitioner did not
19 file a response to the Objections.

20 Respondent argues that the 70-day delay between Petitioner's
21 filing of his California Court of Appeal habeas petition and his
22 California Supreme Court habeas petition was not "reasonable,"
23 Petitioner was therefore not entitled to "gap" tolling of that
24 period, and the Magistrate Judge erred in finding to the
25 contrary. (Objections at 3-9.) The Magistrate Judge found that
26 the 70-day period was reasonable because during that time
27 Petitioner significantly revised his habeas petition to add a
28 claim that he had not presented in his court of appeal habeas

1 petition - specifically, he added the sentencing-error claim he
2 unsuccessfully tried to raise before the superior court in his
3 "Modification of Sentence" motion, along with revised argument
4 and citations to evidence from the record. (Compare Lodged Doc.
5 9 ("Modification of Sentence Pursuant to Penal Code Section
6 1260") with Lodged Doc. 11 (supreme court habeas petition).)

7 In his Objections, Respondent argues that the addition of
8 that claim does not justify the 70-day delay because Petitioner
9 was "not seeking review of the lower court's ruling with respect
10 to that claim" but rather was "embarking on a new round of
11 collateral review." (Objections at 7.) But Petitioner was
12 indeed seeking review of a lower court's ruling: shortly after
13 the court of appeal denied his habeas petition, the superior
14 court denied his sentencing-error claim, and Petitioner then
15 revised it substantially in order to correct its deficiencies
16 before presenting it to the state supreme court as part of his
17 habeas petition. Cf. King v. Roe, 340 F.3d 821, 823 (9th Cir.
18 2003) (gap tolling applies to period between denial of one
19 petition and filing of another when petitioner revises petition
20 to "correct the deficiencies" in the prior one), abrogation on
21 other grounds recognized by Waldrip v. Hall, 548 F.3d 729 (9th
22 Cir. 2008).

23 Several factors support the Magistrate Judge's conclusion
24 that the 70-day gap in this case was reasonable. First, the
25 length of the gap beyond the presumptively reasonable 60 days was
26 relatively modest, a mere 10 days. Very few courts have found
27 gaps between 60 and 70 days to be unreasonable. See Gonzales v.
28 Hubbard, No. CV 11-3395-GAF (AGR), 2011 WL 6951958, at *3 (C.D.

1 Cal. Nov. 28, 2011) (noting that "Respondent has failed to
2 identify any court that has found a delay of between 61 and 70
3 days unreasonable, even if completely unexplained"), accepted by
4 2012 WL 28649 (C.D. Cal. Jan. 4, 2012); Wynn v. Martel, No. CIV
5 S-09-2728 JAM DAD P, 2011 WL 864500, at *6 (E.D. Cal. Mar. 10,
6 2011) (noting that "district courts in California have generally
7 found that even unexplained delays of 61 to 70 days in pursuing
8 relief between courts are not unreasonable," and collecting
9 cases), accepted by 2011 WL 1811109 (E.D. Cal. May 12, 2011); but
10 see (Objections at 6 (listing three unpublished district court
11 decisions in which unexplained or patently illegitimate gaps
12 between 65 and 70 days were suggested to be unreasonable)).
13 Second, the state superior court did not deny Petitioner's
14 sentence-modification motion until February 3, 2011 - barely more
15 than a month before Petitioner filed his state supreme court
16 habeas petition, on March 9, 2011. During that interval,
17 Petitioner substantially rewrote the claim in an attempt to
18 correct its deficiencies before presenting it to the supreme
19 court. Third, Petitioner is thus unlike those claimants who
20 essentially sit on their hands during gaps longer than
21 presumptively reasonable and offer no explanation for the
22 additional delay.

23 None of the cases Respondent cites involve analogous facts
24 and thus do not compel a conclusion different from that reached
25 by the Magistrate Judge. See King, 340 F.3d at 823 (addressing
26 propriety of gap tolling between denial of first petition to
27 California Supreme Court and later, "separate round" of petitions
28 commencing in court of appeal); McCoy v. Hedgpeth, No. 11-0653-

1 MMA (WVG), 2011 WL 6961023, at *4 (S.D. Cal. Aug. 3, 2011)
2 (analyzing gap tolling for period between two separate petitions
3 filed in same court of appeal when second petition "added two new
4 claims" that were "unrelated to the first Petition"), accepted by
5 2012 WL 33077 (S.D. Cal. Jan. 6, 2012); Hemmerle v. Schriro, 495
6 F.3d 1069, 1075-76 (9th Cir. 2007) (gap tolling unavailable for
7 time between petitioner's filing of two preliminary check-box
8 notices of intent to seek postconviction relief when first notice
9 did not include "any supporting documentation or factual
10 elaboration" and thus did not raise a "claim" that could be
11 tolled).

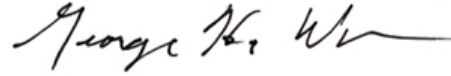
12 In particular, McCoy, the case that at first blush might
13 seem most analogous to this one, specifically rests on the fact
14 that the two petitions at issue were filed in the same court,
15 rendering the second one clearly successive. See 2011 WL
16 6961023, at *3 ("Statutory tolling is unavailable for the
17 interval between successive filings in the same court," and
18 citing cases; "The Ninth Circuit applies a two part test to
19 determine whether the period between the denial of one petition
20 and the filing of a second petition in the same court should be
21 tolled," and citing cases). (Hemmerle, too, concerns a
22 successive petition filed in the same court and the gap between
23 it and the first petition in that court. See 495 F.3d at 1075.)
24 Here, by contrast, what's at issue is the gap between a court of
25 appeal habeas petition raising three claims and a subsequent
26 habeas petition raising those same three claims plus one
27 additional one. Given that the California Supreme Court is a
28 court of original jurisdiction and thus one in which habeas

1 claims may be raised for the first time, the distinction is not
2 insignificant. Moreover, the gap at issue in McCoy, almost five
3 months, see 2011 WL 6961023, at *4, is substantially longer than
4 the 70 days here. Certainly anything more than the very modest
5 delay at issue here would likely not be appropriate in these
6 circumstances. Finally, the second petition in McCoy contained
7 mostly new claims and thus truly was attempting to initiate an
8 entirely separate round of review, see id., whereas the state
9 supreme court petition here consisted primarily of claims
10 Petitioner had raised in his court of appeal petition and thus
11 was simply a continuation of the first and only round of
12 postconviction review.

13 In sum, the Court is not awarding Petitioner gap tolling
14 between a first round of postconviction review and a second,
15 separate round. Indeed, the Report and Recommendation
16 recommended that Petitioner not receive tolling for the pendency
17 of the Modification of Sentence motion. (See Report &
18 Recommendation at 8-9.) Rather, the Court simply concludes that
19 given Petitioner's substantial rewriting of the claim raised in
20 that motion before presenting it (as well as three claims that
21 were in his state court of appeal habeas petition) to the state
22 supreme court, the short 10-day delay beyond the presumptively
23 reasonable 60-day period for filing a petition in the next
24 highest court was itself reasonable. The Court therefore accepts
25 the findings and recommendations of the Magistrate Judge.

1 IT THEREFORE IS ORDERED that Respondent's motion to dismiss
2 is DENIED. Respondent is ORDERED to file an Answer to the
3 Petition within 28 days of service of this Order.

4
5 DATED: August 29, 2012



6 GEORGE H. WU
7 U.S. DISTRICT JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28